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No. 1091

In the Supreme Court of the United States

OCTOBER TERM, 1946

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

In the District Court of the United States for the Western District of Virginia

CIVIL NO. 178

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INC., PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated December 21, 1946,[1] of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. Appeal was allowed on February 1,

[1] The Court also rendered an opinion on the same date.

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1947, and appeal papers were served on February 11, 1947.[2]

The Commission's order dated January 14, 1946 was made in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C. 5). The order denied appellants' application for authority to purchase a portion of the operating rights of W. B. Draper, a motor carrier, doing business as Draper Motor Service.

Falwell Fast Freight, Inc. (hereinafter called Falwell), is a motor carrier holding authority, under its own operating rights, to transport general commodities over a regular route between Lynchburg, Virginia and New York City. Acquisition by Falwell of the operating rights of one Evans as a regular route carrier, between Bluefield, West Virginia and Roanoke, Virginia, was authorized by the order here under review, but that part of the order was not assailed and is not involved in the pending suit. The rights which Falwell sought to acquire from Draper, but which were denied by the Commission's order under review, covered irregular route operation between Roanoke and Lynchburg; such rights being a portion of Draper's irregular route

[2] It does not appear that notice of appeal was served upon the Attorney General of the Commonwealth of Virginia, in accordance with the provisions of 28 U. S. C. 45a. No citation on appeal has been served; nor did the jurisdictional statement have appended thereto a copy of the opinion of the court below as required by Rule 12.

authority to operate "radially"[3] between Roanoke, on the one hand, and, on the other, Lynchburg, Richmond, and numerous other points. Draper undertook to transfer to Falwell only the right to operate between Roanoke and Lynchburg. Draper retains all its other rights, including the right to operate between Roanoke and Richmond. This operation to Richmond would involve use between Roanoke and Richmond of the same highway (No. 460) which would be used by Falwell in operating the transferred rights. Thus in effect, insofar as physical operations on the highway are concerned, Draper would still retain the right to duplicate the operation sought to be transferred to Falwell.[4]

By virtue of temporary authority granted by the Commission, Falwell had been conducting operations over the Draper rights between Lynchburg and Roanoke; and the Commission had before it in the instant proceeding extensive

[3] The Commission has classified as "radial" that type of operation which is conducted between a central "base area" and an outlying "peripheral area." Radial operation is analogous to movement along the spoke of a wheel, between the hub and the circumference. Conversely, the pattern of operation is designated as "non-radial" when transportation is furnished between any points lying within the territory which a carrier serves. See *Classification of Motor Carriers*, 2 M. C. C. 703, 709; *Gonce* v. *United States*, 48 F. Supp. 286 (D. Mass., 1942).

[4] Though Draper, after the transfer, would not be authorized to handle Lynchburg traffic while serving Roanoke and Richmond.

evidence regarding the manner and character of Falwell's use of the Draper rights. Falwell's testimony on that subject at the hearing before the Commission disclosed even more vividly than the Commission's findings in its report the fact that Falwell's actual operations over the Draper rights between Lynchburg and Roanoke under temporary authority had been conducted in such a manner as practically to obliterate the distinction between regular and irregular route service.[4] This testimony showed also that, if the application were granted, Falwell intended to continue operation over the Draper rights in the same manner as operations had been conducted under the temporary authority. The Commission made findings in accordance with this testimony.

However, inasmuch as appellants did not offer in evidence before the District Court the complete record made before the Commission, they are precluded from attacking the Commission's findings, which must be accepted as true. *Mississippi Valley Barge Line Company* v. *United States,* 292 U. S. 282, 286; *Howard Hall Co., Inc.* v. *United States,* No. 627 October Term 1945, aff'd May 6, 1946.

Appellees submit that the appeal presents no substantial question, and that the judgment of the

[4] The testimony indicated that Falwell's through operation between Lynchburg and Roanoke in continuation of regular route schedules coming into those cities off the Falwell or Evans routes was limited only by the war-time lack of available equipment (Tr. 50, 51, 68).

District Court should be affirmed. Appellants raise three points in the assignments of error set forth in their petition as amended:*

1. That the report and order of Division 4 of the Commission, entered February 22, 1945, are to be treated as constituting in fact and substance a certificate of public convenience and necessity, revocable only under Section 212 (a) of the Interstate Commerce Act as amended (49 U. S. C. 312 (a)).

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* These assignments are set forth in the following language:

(a) That the report and order of the Commission, acting through Division 4, of February 22, 1945, were, in their nature and effect, a certificate of public convenience and necessity within the meaning of the statutory provisions;

(b) That the report and order of the Commission, acting through Division 4, of February 22, 1945, are not subject to the provisions of Section 17 of the Act (49 USCA 17), as the report and order of the Commission, acting through Division 4, of February 22, 1945, are subject to the provisions of Section 212 (a) of the Act (49 USCA 212 (a)) and can be suspended or terminated only as specifically provided in the aforenamed section;

(c) That there is no satutory authority for the Commission to alter or trim down a certificate of a carrier by imposing limitations and restrictions upon the kind of service that the said carrier can render differing from the kind of service that the certificate authorizes the carrier to render, as the Commission has done with respect to the kind of service capable of being rendered under the certificate issued to Draper; and

(d) That the report and order of the Commission dated January 14, 1946 are contrary to the provisions of Section 5 of the Act (49 USCA 5).

2. That the order made by the full Commission on January 14, 1946, upon reconsideration of the prior order of Division 4, is invalid because based upon an erroneous conception of the kind of service that an irregular route carrier may render.

3. That the full Commission's order, denying approval of the proposed transfer of operating authority, was not in conformity with the requirements of Section 5 of the Act (49 U. S. C. 5).

As to appellants' first contention, it is clear that the order of Division 4 was reviewable by the full Commission, and was not a "certificate."

It is plainly provided in Section 17 of the Act (49 U. S. C. 17), relating to Commission procedure, that the decision of a Division of the Commission is subject to reconsideration by the full Commission. It is not disputed that a timely petition for reconsideration, complying with the requirements of Rule 101 of the Commission's Rules of Practice, was filed by Brooks Transportation Company, intervening defendant in this case, a protestant in the proceedings before the Commission. Pursuant to such petition the matter was reopened for reconsideration by the full Commission; and the full Commission, disagreeing with the conclusions of Division 4, decided to disapprove the proposed transfer of operating authority.

Obviously Falwell could not oust the Commission of its statutory jurisdiction by undertaking

to consummate the transaction in accordance with the decision of Division 4, while that decision was still subject to reconsideration by the full Commission. Falwell was clearly acting at its own risk and peril in seeking to effect the transfer of Draper's rights prior to the expiration of the time within which petitions for reconsideration might be filed.

This conclusion follows *a fortiori* from the holding in *Baldwin* v. *Milling Co.*, 307 U. S. 478. In that case a shipper was required to repay money actually paid to it as reparation, when the Commission two years later reopened the case and reversed its previous decision that the rates charged by the carrier had been unreasonable. In the case at bar there is some question as to whether Falwell actually paid over the purchase price.

It is inconceivable that, by reason of Falwell's haste in acting upon the decision of Division 4, the full Commission should be deprived of its statutory power of review. As well might it be argued that the Supreme Court's appellate jurisdiction can be defeated by prompt action taken by a litigant in reliance upon the judgment of a subordinate tribunal, when the time within which an appeal from the court below may be taken has not expired and such an appeal is subsequently taken. It is established law that the Commission is not bound by the proposals and recommendations of its examiners or Divisions,

when they are subsequently superseded by the final action of the full Commission. *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349, 370–1; *Federal Radio Commission* v. *Nelson Bros.,* 289 U. S. 266, 285–6.

In the Commission's practice a clear distinction has always been made between an order authorizing issuance of a certificate, and the certificate itself, a separate document. Any doubt as to this distinction has been set at rest by the recent decision in *United States* v. *Seatrain Lines, Inc.,* No. 61, October Term 1946, decided January 6, 1947. Appellants' entire argument with respect to the revocability of certificates under Section 212 (a) of the Act is predicated upon the unsound assumption that the report and order of Division 4 approving the transfer of Draper's rights to Falwell, constituted in legal contemplation a "certificate."

The Commission's practice is shown by the fact that a certificate was issued by the Commission to Falwell on August 9, 1946, covering his own prior rights and also those acquired from Evans. Exhibit A to Answer of Interstate Commerce Commission. In this certificate the Commission did not include the Draper rights.

These arguments made by appellants are so plainly without merit, so contrary to the express provisions of statute as well as the Commission's uniform administrative practice, that they deserve

no serious consideration. Appellants' argument substantially comes to this: Falwell is operating; operation without a certificate is illegal; therefore, Falwell has a certificate. The unsoundness of such reasoning is obvious.

As to appellants' second point, it is equally clear that the Commission did not commit error when it recognized and applied the distinction between regular and irregular route service. In so doing the Commission was merely giving effect to a distinction long recognized in the motor carrier industry and specifically embodied in the Act itself as construed by the decisions of the Supreme Court.

Thus, in *United States* v. *Maher*, 307 U. S. 148, in upholding denial of a "grandfather" application where during the "grandfather" period the applicant had changed the nature of his operation from irregular to regular route service, the Court said:

> The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory," Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini. Such

> recognition is implicit also in the provision of § 208 (a) that "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application.

Similarly, in *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, 480, after referring to the provisions of Sections 206 (a) and 208 (a) of the Act, the Court said:

> It is clear from these provisions that the power of the Commission to authorize future operations within a designated "territory," rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee.

Contrary to what appellants assert in Assignment of Error (c), the Commission's order did not change or alter the kind of service which Draper was authorized by his "grandfather"

certificate to perform. On the contrary, the Commission's order preserved Draper's "grandfather" rights intact, and prevented the dislocation of the Roanoke-Lynchburg segment from the historical pattern of radial operation which was the basis of their being originally granted to Draper. The Commission's order in no wise impairs Draper's rights; it merely disapproves of the transfer of a single portion of them to Falwell, while Draper retains the rest. It is Falwell, and not the Commission, who sought to change the nature of the operations to be conducted under Draper's rights, by transforming such operations from irregular route radial service, as theretofore performed by Draper since prior to June 1, 1935, into a new species of service practically indistinguishable from the regular route service conducted over the Evans and Falwell rights.

As to appellants' final contention, that the Commission's order is contrary to the provisions of Section 5 of the Act, it is clear that this assertion is likewise without merit. In essence what appellants here contend is that the Commission was bound to presume that Falwell could and would respect, in its future operation, the restriction against regular route operation over the Draper rights. But such a presumption would have required the Commission to ignore the inescapable inferences from the clearly disclosed facts

regarding Falwell's past performance and unmistakable intentions for the future.

In another case, *Alton Railroad Company* v. *United States,* 315 U. S. 15, 21, the Court recognized that the Commission had been liberal in awarding extensive territory to irregular route carriers where the "characteristics of the transportation service involved" were such that substantial *bona fide* service could be shown without proof of actual instances of transportation.

In *Ex parte No. MC–10, Classification of Motor Carrier of Property,* 2 M. C. C. 703, 709, decided August 9, 1937, the Commission, pursuant to the authorization in Section 204 (c) of the Act with respect to classifications of carriers, adopted definitions distinguishing between regular and irregular route service.

In view of the foregoing authorities, it is clear that the Commission was entitled to take into consideration, in passing upon the effect of the proposed transaction upon the public interest, the long-recognized distinction between the two types of service. Consequently, in the light of the facts found by the Commission regarding Falwell's past mode of operation, the Commission was warranted in concluding that the transfer of Draper's rights to Falwell should not be approved.

The record made it plain that such transfer would result in a substantial change in the nature of the operations conducted under authority of

those rights. Draper's right to operate between Roanoke and Lynchburg was a part of a "radial" pattern of operation in which he was engaged on the "grandfather" date. Draper's operation viewed as a whole, therefore, as has been previously indicated, presents a pattern comparable to a wheel having numerous spokes. The right sought to be transferred to Falwell was thus merely one segment of an integrated entity, one of the spokes in the wheel; the Commission was warranted in concluding that it should not be separately assigned and transferred to another carrier.

It is submitted that in the light of the facts found by the Commission, and in the light of the extensive discretion which is conferred upon the Commission with respect to approval of transactions under Section 5, the Commission's decision disapproving the purchase of Draper's rights by Falwell is clearly justified and in accordance with applicable law.

The wide range of administrative discretion vested in the Commission by Section 5 is clearly manifested in the recent judicial decisions which have dealt with that section of the Act: *McLean Trucking Company* v. *United States,* 321 U. S. 67; *Schultz* v. *United States,* 59 F. Supp. 338 (W. D. Wisc., 1945); *General Transportation Company* v. *United States,* 65 F. Supp. 981 (D. Mass., 1945), aff'd October 14, 1946.

Moreover, the legislative history of Section 5 of the Interstate Commerce Act, as amended, shows the extent of the wide range of discretion given to the Commission in this type of case. Section 5 is a statutory prohibition upon mergers and other acquisitions of control of carriers, in the absence of permission from the Commission when it finds that the proposed transaction is consistent with the public interest.

In the original Act to Regulate Commerce passed in 1887, Section 5 was an outright prohibition of pooling of traffic and revenue.[7] This anti-pooling provision may be regarded as a precursor of the broader prohibitions contained in the Sherman Antitrust Act which became law three years later.[8]

These restraints were relaxed by the Transportation Act of 1920.[9] Section 5 was amended so as to permit pooling upon specific order of the Commission. Upon similar approval acquisitions under lease or by the purchase of stock or in any other manner not involving consolidation into a

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[7] 24 Stat. 379, 380.

[8] Sherman Act of July 2, 1890, 26 Stat. 209. In a textbook by William L. Snyder, *The Interstate Commerce Act and Federal Anti-Trust Laws* (1904), 121–22, the author points out that:

> The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well.

[9] 41 Stat. 456, 480.

single system were made lawful. Consolidation was also permitted subject to certain conditions requiring that the proposed consolidation be in harmony with the general plan for railroad consolidations to be prepared by the Commission.

The Emergency Transportation Act of 1933 again amended Section 5.[10] The distinction between "acquisitions of control" and "consolidation into a single system" was eliminated, and a single procedure was established for dealing with the several methods of unification. A provision was added specifically prohibiting "control or management in a common interest" in whatever manner effected, except as provided in Section 5.[11]

When motor carriers were brought under regulation in 1935, Section 213 (a) of the Motor Carrier Act[12] provided a scheme of Commission control of unification which was patterned after Section 5.

The Transportation Act of 1940 amended Section 5 so as to make it applicable to rail, motor,

[10] 48 Stat. 211, 217.

[11] In the *Nickel Plate* case, 79 I. C. C. 581, the Commission had held (Commissioner Eastman dissenting), that its approval was not necessary, under Section 5 as amended by the Transportation Act of 1920, for a merger not violative of the antitrust laws, but that the consolidation might be effected under state law. *Snyder* v. *New York Central and St. Louis Railroad Company*, 99 *Ohio St.* 72, 85, aff'd 278 U. S. 578.

[12] 49 Stat. 543, 555.

and water carriers." At the same time the Commission's authority was broadened by the insertion of the words "or otherwise" after the provision relating to control "through ownership of stock." (See *United States* v. *Marshall Transport Co.*, 322 U. S. 31, 38–9).

These successive changes and amendments in the language of Section 5 indicate a clear and increasing intent on the part of Congress to prohibit all acquisitions by one carrier of the control, assets, or operating rights of another carrier without Commission approval. Congress intended that such transactions should be permitted only after careful scrutiny by a public agency, and after a determination by that agency that the proposed transaction will be consistent with the public interest.

Thus it must be remembered that Falwell has no legal right to purchase Draper's operating authority. The transaction is *prima facie* prohibited by statute; and becomes licit only when, as, and if it is specifically approved by the Commission. In the case at bar such approval by the Commission has not been granted, but has been withheld. Operating rights as a motor carrier are not assignable freely like a negotiable instrument but may be transferred to a new holder only when the administrative body having jurisdiction

[13] 54 Stat. 898, 905. Section 213 (a) of the Motor Carrier Act was accordingly repealed.

has concluded, after careful scrutiny, that the proposed transaction is warranted as being in accordance with the public interest.

It would require a strong showing to demonstrate that the Commission, an expert agency entrusted by Congress with the function of safeguarding "the public interest" in an adequate national transportation system, had, in disapproving the purchase by Falwell of a portion of Draper's operating authority, acted arbitrarily or in bad faith instead of conscientiously determining the issues presented in accordance with its understanding of the transportation situation and the public welfare. No such showing has been made here by appellants.

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

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